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[Ed. Note.— For cases in point, see Cent. Dig. vol. 37, New Trial, § 311.]

2. Same—Nature of Evidence.—The newly discovered evidence which will warrant the granting of a new trial must be such as ought on another trial to produce a different result.

[Ed. Note.— For cases in point, see Cent. Dig. vol. 37, New Trial, § 226.]

3. Same.—Newly discovered evidence which discredits witnesses of the successful party by showing that the witnesses testified falsely, and that it was impossible for them to have been witnesses to the fact testified to by them under the circumstances disclosed, does not require the granting of a new trial.

[Ed. Note.— For cases in point, see Cent. Dig. vol. 37, New Trial, §§ 221, 222.]

BROWN *v.* GIBSON'S EX'R.

Nov. 21, 1907.

[59 S. E. 384.]

1. Wills—Codicil—Construction.—Testatrix, by the fourth clause of her will, provided for the cancellation and surrender by her executor to the obligors of all notes, bonds, or other evidences of debt belonging to her and remaining unpaid at the date of her death, from whomsoever due. Testatrix executed a codicil, revoking such clause and providing in lieu thereof a direction that any note or other evidences of indebtedness remaining unpaid at the date of her death from certain specific individuals, including complainant, should be canceled and surrendered by her executor to the obligors in full satisfaction thereof. At her death testatrix held the obligations of all the persons named in the codicil, except complainant, who was not indebted to her, but was indebted to another on an unmatured obligation secured by a mortgage on her farm. Complainant was related to testatrix, but the other beneficiaries under the codicil were mere borrowers of her money. Held, that the codicil did not create an obligation on the part of the executor to purchase complainant's debt from the holder and cancel the same.

2. Same—Intent.—In the construction of a will, the inquiry is, not what testator intended to express, but what the words used do express.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, § 955.]

3. Same—"Surrender."—Where a codicil directed that the executor should surrender certain evidences of indebtedness against specified legatees, the word "surrender" implied possession on the part of testatrix, so as to exclude debt which testatrix did not own.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 8, pp. 6819-6821.]

4. Same—"Cancel."—The word "cancel" as used in a codicil directing cancellation of certain debts owing by legatees to testatrix, implied a forgiveness and obliteration of the debt, and excluded the idea of payment.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 1, pp. 949-951.]

DICE et al. v. SHERMAN.

Nov. 21, 1907.

[59 S. E. 388.]

1. Eminent Domain—Public Use—How Determined.—When the power of eminent domain is invoked, it must be made clearly to appear that the property sought to be condemned is useful to the public, and the existence or nonexistence of a public use in any given case must be determined by the court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Eminent Domain, §§ 51, 525.]

2. Same—Proceedings—Petition—Sufficiency—Taking Property for Private Use—Constitutional Provisions.—Code 1904, § 1347, provides that a person having, upon lands owned by him on a water course, or proposing to build on such lands, a water mill, or other manufactory, etc., useful to the public, and desiring leave to erect a dam across such water course, etc., may apply for such leave to the circuit court, etc. Held, that a petition for leave to erect a dam on a creek for the purpose of securing power to operate "a public cider mill and the machinery of a certain public telephone exchange" then on land owned by petitioner, and praying for condemnation of certain land, did not show that the purpose for which the property was sought to be taken was for a public use, and a judgment of condemnation based on such petition was a taking of private property for a private purpose and unauthorized by the Constitution.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Eminent Domain, § 512.]